IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17-08-2007

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MRS. JUSTICE R. BANUMATHI

HABEAS CORPUS PETITION NO.210 OF 2007

Kumaravel
S/o.Dr.R. Rajasekaran .. Petitioner

Vs.

1. Government of Tamil Nadu,
rep. by the Secretary to
Govt., Public (SC) Department,
Secretariat, Chennai 600 009.

2. Union of India, rep. by
Secretary to Govt. of India,
Ministry of Finance,
Department of Revenue,
COFEPOSA Unit,
Central Economic Intelligence Bureau,
Janpath Bhavan, B Wing,
New Delhi 110 001. .. Respondents

Petition filed under Article 226 of the Constitution of India for the issuance of writ of Habeas Corpus calling for the records of the first respondent in GO.No.SR.1/59-2/2007 dated 1.02.2007 quash the same and direct the respondents to produce the body of the detenu Surendran Balachandran S/o. A.S. Surendran, normal resident of 83G, Coronation Colony, Sivakasi, PO & TK, Virudhunagar District presently undergoing detention under the provisions of Conservation of Foreign Exchange & Prevention of Smuggling Activities Act in Central Prison, Chennai and set him at liberty.

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For Petitioner : Mr.B. Kumar
Senior Counsel for
Mr.R. Loganathan

For Respondent-1 : Mr.M. Babu Muthu Meeran
Addl. Public Prosecutor

Respondent-2 : Mr.P. Kumaresan, ACGSC

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O R D E R

P.K. MISRA, J

The order of preventive detention dated 1.2.2007, passed with a view to prevent the detenu from smuggling of goods under Section 3(1)(i) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974), hereinafter referred to as "the COFEPOSA Act" is the subject matter of challenge in the present Habeas Corpus Petition.

2. The order of detention dated 1.2.2007 was effected on 2.2.2007 and the grounds of detention were served on 3.2.2007. From the grounds of detention it appears that the detenu was a passenger proceeding to Shanghai via Kualalumpur. He had one hand baggage and two checked-in baggages. These hand baggage and checked-in baggages were intercepted on 5.1.2007 by the Customs Officer and the detenu was questioned. He declared that he was in possession of Chinese Yuan equivalent to Rs.25,000/- and US Dollars 500. However, on suspicion, the detenu was brought to Air Intelligence Unit, Customs room and search of hand baggage resulted in recovery of EURO 5000 kept in an envelope of "bhagya travels & tours pvt. Ltd., Chennai 600 008." and Chinese Yuan to the tune of 3650 and US$310. Personal search of the detenu led to recovery of EURO 5000 kept in pant pocket and EURO 5000 kept in shirt pocket. Thus, in all foreign currencies worth EURO 15000, US$ 310 and Chinese YUAN 3650 equivalent to Rs.9,16,861/- had been recovered. As the detenu had attempted to smuggle out of India the foreign currencies without possessing any valid document or permit / licence from Reserve Bank of India for the export of the assorted foreign currencies, they were seized under mahazar under Customs Act 1962 read with the provisions of Foreign Exchange Management Act, 1999 (hereinafter referred to as "FEMA"). The detenu gave a voluntary statement on 5.1.2007 and 6.1.2007, wherein he admitted that he had knowingly made gross mistake in attempting to smuggle the foreign currencies. The grounds of detention further recited :-

> "(iii) By attempting to smuggle the above said assorted foreign currencies amounting to Rs.9,16,861/- (Rupees Nine Lakhs Sixteen Thousand Eight Hundred and Sixty One Only) without any valid document or permit of RBI, you had rendered the goods liable for confiscation under the provisions of Section 113(d) and 113(h) of the Customs Act 1962 read with Foreign Exchange Management Act 1999 and you had also rendered yourself liable for penal action under section 114 of the Customs Act 1962. Therefore, the acts of rendering the goods under seizure liable to confiscation under Section 113 of the Customs Act, 1962 amount to smuggling as per Section 2(39) of the Customs Act, 1962.
>
> (iv) You were arrested by the Customs Department, Chennai on 06.01.2007 under Section 104 of the Customs Act, 1962 as there was reason to believe that you were guilty of an offence

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punishable under Section 132 and Section 135 of the Customs Act, 1962 read with Foreign Exchange Management Act, 1999. You were produced at the residence of the learned Additional Chief Metropolitan Magistrate, Economic Offence Court-II, Egmore on 06.01.2007 and were remanded to judicial custody till 19.01.2007. Subsequently, your remand period was extended upto 01.02.2007 and 15.02.2007."

3. On 6.1.2007, the detenu was arrested under Sections 113(d) and 113(h) of the Customs Act read with FEMA. The detention order, had already indicated, was passed on 1.2.2007. In the Habeas Corpus Petition, it has been specifically pleaded that on 27.1.2007, a detailed representation had been sent to the Commissioner of Customs, who is the senior most authority. In such representation, entire defence of the detenu has been clearly set out highlighting as to how his arrest and seizure of foreign currencies were invalid and unfair. Even though such a detailed representation was available much before the detention order, the said vital document was never placed before the detaining authority and, therefore, the order of detention is vitiated on account of the fact that vital relevant materials had not been placed before the detaining authority for consideration. It is further pleaded in this regard that information had been sought for under the Right to Information Act as to how the letter dated 27.1.2007 has been dealt with and a reply was furnished stating that file containing COFEPOSA proposal has to be cleared by the Commissioner. From such reply it is apparent that such important document was not at all considered by the detaining authority. It is further asserted that the bail application filed before the Sessions Court on 29.1.2007 also contained several vital facts by giving greater details and such copy was served on the Counsel for the Government on 29.1.2007 and in fact counter to such bail application was also filed, yet such bail application was never placed before the detaining authority. It has been submitted by the counsel for the petitioner that if these two vital documents, namely, representation dated 27.1.2007 addressed to the Commissioner of Customs, who is the Head of the Department available at Chennai, and the bail application, which was filed before the Sessions Court, to which even counter had been filed, would have been placed before the detaining authority, the detaining authority while exercising his subjective satisfaction could have come to some other conclusion and non-placing of such vital documents has the effect of vitiating the order of detention.

4. In the petition under Section 6 of the Right to Information Act, it had been specifically requested to furnish reply as to how representation dated 27.1.2007 was dealt with and it is stated that "If the proposal for detention under COFEPOSA ACT is made will it come before the Commissioner for approval or noting or before being forwarded to Government with a request to pass order of detention."

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In reply dated 17.2.2007, it has been indicated that letter dated 27.1.2007 was received in the Office of the Commissioner of Customs, Sea Port, Rajaji Salai, Chennai and "As the matter pertains to Commissioner of Customs (Airport), Meenambakkam, Chennai-27, it was reforwarded to this office and was received on 16.02.2007." It was further stated therein that any proposal for detention under COFEPOSA would come before the Commissioner before being forwarded to the State Government. In the above factual background, the contention of the learned senior counsel that there has been non-application of mind to many vital aspects as the relevant materials were not placed before the Detaining Authority, is acceptable.

5. Learned Senior Counsel has further submitted that in the representation made to the Government on 20.2.2007, after the detention order was passed, it was specifically indicated :-

> "The Customs authorities have suppressed vital material. On behalf of the Detenu his Father A.S. Surendran had sent a detailed letter addressed to the Commissioner of Customs and sent by RPAD on 27.1.2007. It was received by the Addressee on 29.1.2007. In the said communication it has been specifically mentioned that it has been written in connection with R.R.No.2/2007. This vital document has not been placed before the Government. Therefore the Government has been disabled from considering a vital document which would have altered its satisfaction.
>
> Thus grave injustice has been done to the Detenu. In the said representation specific details have been given about the drawal of the foreign currencies lawfully by the Detenu from the authorised money changer above referred. This ought to have been verified by the Customs Authorities. Without verifying and by misleading investigation, the Detention order has been made.
>
> The Customs Authorities have also suppressed the facts that on behalf of the Detenu a further Application for Bail was filed on 29.1.2007 before the Sessions Judge (Principal) Chennai. In the said Bail Application full and complete details of the defence have been given. This Bail Application came to be disposed on 1.2.2007. This Bail Application has also been not taken into consideration, nor the factum of order of dismissal of the Bail application.
>
> If the Government has taken into consideration the Bail application, it would not have passed the order of Detention against the Detenu. In this regard the detenu states that he is quite confused about the offence he is said to have committed. The Grounds of Detention states that the Detenu had violated certain provisions of the Customs Act r/w.Foreign Exchange Management Act (FEMA) 1999. But no provisions of FEMA has any application to the facts of the instant case. The Detenu may be apprised of clearly on what section or Sections of FEMA are

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attracted. Unless these details given it will not be possible to make a reasonable explanation. Atleast now these details and provisions of law under FEMA may be given."

Reply to such representation, which had been rejected, is dated 1.3.2007. It has been stated :-

"3. In your voluntary statement, you had stated that you had been travelling to China and Korea for the past 8 years for importing machines. Hence having travelled so frequently and widely you should be familiar with the procedures/rules and regulations of the Customs declaration/purchase of foreign currencies. Nevertheless you had not declare the foreign currencies in your possession and you did not produce any documentary proof for the foreign currencies you had carried at the time of interception and mis-declared the same before the Customs Intelligence Officers at Airport. As per section 113(d) and section 132 of Customs Act, 1962, you have rendered the goods liable for confiscation and thus rendered yourself liable for penal action under section 135 of Customs Act, 1962. You have not produced any documentary proof for the acquisition of the foreign currencies from the authorized agent and for the reasons of violation of regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulation, 2000, by which no person shall, without the general or special permission of the Reserve Bank, export or send out of India, or import or bring into India, any foreign currency, and regulation 7(3)(ii) of the above regulation provides that any person may take out of India, unspent foreign exchange brought back by him into India while returning from travel abroad and retained in accordance with the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000 and regulation 3(iii) & (d) provides for retention by a person resident in India of foreign currency notes, or bank notes and foreign currency, travelers cheques not exceeding US $ 2000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travelers cheques, represents unspent amount of foreign exchange acquired by him from an authorized person for travel abroad. Thus you have violated the provisions of Customs Act, 1962 read with the Foreign Exchange Management Act, 1999."

6. From this reply rejecting the representation, it is apparent that inspite of specific assertion made in the post-detention representation that representation dated 27.1.2007 made to the Commissioner of Customs and also the bail application had never been placed. It is also apparent that the State Government, which had jurisdiction to deal with such representation, has never bothered to call for copy of the bail application as well as copy of the representation, which was admittedly made before the Commissioner of Customs. Therefore, even assuming that for some valid reasons representation dated 27.1.2007, which was addressed to the Commissioner of Customs, Head of the Department,and the bail application to which a counter had been filed,

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could not be placed before the detaining authority, at least at the stage of consideration of the post detention representation, the detaining authority owed an obligation to call for those documents nor satisfy itself about the contentions raised on behalf of the detenu.

7. In 1969(1) SCC 433 (ABDUL KARIM v. STATE OF WEST BENGAL) it was observed :-

> "But it is a necessary implication of the language of Art.22 (5) that the State Government should consider the representation made by the detenu as soon as it is made, apply its mind to it and, if necessary, take appropriate action. In our opinion, the Constitutional right to a proper consideration of the representation by the authority to whom it is made. The right of representation under Art.22(5) is a valuable Constitutional right and is not a mere formality."

8. In (1975)3 S.C.C.198 (HARADHAN SAHA v. STATE OF WEST BENGAL), the Supreme Court had emphasised the necessity for a real and proper consideration of the representation by the appropriate Government. The Supreme Court had observed:-

> "We cannot over-emphasise the need for the closest and most zealous scrutiny of the representation for the purpose of deciding whether the detention of the petitioner is justified."

9. The aforesaid decision was followed in AIR 1975 SC 775 (JOHN MARTIN v. STATE OF WEST BENGAL), wherein it was observed :-

> "3. ... This, however, does not mean the appropriate Government can reject the representation of the detenu in a casual or mechanical manner. The appropriate Government must bring to bear on the consideration of the representation on unbiased mind."

10. In (1991) 1 S.C.C.476 (K.M. ABDULLA KUNHI V. UNION OF INDIA), the Supreme Court emphasised the necessity of real and proper consideration.

11. More recently, following the aforesaid decisions, it has been observed in 2004 S.C.C. (Crl.) 618 (A.C. RAZIA v. GOVERNMENT OF KERALA) as follows :-

> "22. ... The exercise of the power under Section 11 should not be a mere formality or a farce. Care and vigilance should inform the action of the Government while discharging its supervisory responsibility. ..."

12. Judged in the light of the aforesaid decisions of the Supreme Court which have been followed (obviously required to be followed being binding precedent), it is apparent that in the present case the concerned authorities have not bestowed required attention to the contents of the post-detention representation. It may be that even after going through the bail application and the representation made to the Commissioner of

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Customs before the detention order had been passed, the detaining authority could have come to very same conclusion. However, since specific assertions had been made in the representation regarding suppression of relevant materials, least one could have expected from the appropriate authority was to call for those documents, namely, representation dated 27.1.2007 made to the Commissioner of Customs and the bail application filed before the Sessions Court.

13. Before parting with the case, we feel it as our duty to remind ourselves, as the authorities who are vested with important and enormous power of directing detention of a person without a trial, the anguish expressed by Bhagwati, J in the decision reported in AIR 1980 SC 1183 (SMT. ICCHU DEVI CHORARIA v. UNION OF INDIA AND OTHERS) :-

> "3. . . . We may point out straightaway that we are not at all happy at the thought that our order may have resulted in setting free a possible smuggler. We are not unmindful of the fact that the COFEPOSA Act has been enacted for the purpose of eradicating the evil of smuggling which is eating into the vitals of the nation like a cancerous growth and eroding the economic stability of the country and when an order is made by the Court releasing a person detained under this Act, it is quite possible that the effect of the order may be to let loose on the society, a smuggler who might in all probability, resume his nefarious activities causing incalculable mischief and harm to the economy of the nation. But at the same time we cannot forget that the power of preventive detention is a draconian power justified only in the interest of public security and order and it is tolerated in a free society only as a necessary evil. The power to detain without trial is an extraordinary power constituting encroachment on personal liberty and it is the solemn duty of the Courts to ensure that this power is exercised strictly in accordance with the requirements of the Constitution and the law. The courts should always lean in favour of upholding personal liberty, for it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have rightly laid down their lives at its altar in order to secure it, protect it and preserve it. The Constitution has therefore, while conceding the power of preventive detention, provided procedural safeguards with a view to protecting the citizen against arbitrary and unjustified invasion of personal liberty and the courts have always zealously tried to uphold and enforce these safeguards. This Court has also through its judicial pronouncements created various legal bulworks and breakwaters into the vast powers conferred on the executive by the laws of preventive detention prevalent at different points of time. It is true that sometimes even a smuggler may be able to secure his release from detention if one of the safeguards or requirements laid down by the Constitution or the law has not been observed by the detaining authority but that can be no reason for whittling down or diluting the

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safeguards provided by the Constitution and the law. If the detaining authority wants to preventively detain a smuggler, it can certainly do so, but only in accordance with the provisions of the Constitution and the law and if there is a breach of any such provision, the rule of law requires that the detenu must be set at liberty, however wicked or mischievous he may be. The law cannot be subverted, particularly in the area of personal liberty, in order to prevent a smuggler from securing his release from detention, because whatever is the law laid down by the courts in the case of a smuggler would be equally applicable in the case of preventive detention under any other law. This court would be laying down a dangerous precedent if it allows a hard case to make bad law. We must, therefore, interpret the provisions of the Constitution and the law in regard to preventive detention without being in any manner trammeled by the fact that this is a case where a possible smuggler is seeking his release from detention."

14. We feel that the sentiments expressed in the said decision must be kept in view by the detaining authorities who should bestow serious attention to the relevant circumstances in each case before deciding to incarcerate a person in prison or while considering the representation.

15. For the aforesaid reasons, we are constrained to quash the order of detention and the detenu is set at liberty forthwith unless his presence is required in any other case.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

dpk

To

1. The Secretary to
Govt., Public (SC) Department,
Secretariat, Chennai 600 009.

2. The Secretary to Govt. of India,
Ministry of Finance,
Department of Revenue, COFEPOSA Unit,
Central Economic Intelligence Bureau,
Janpath Bhavan, B Wing,
New Delhi 110 001.

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3. The Public Prosecutor,
   High Court, Madras.

4. The Superintendent of Central Prison, Chennai

5. The Joint Secretary to Government,
   Public (Law and Order)
   Fort St.George, Chennai - 9

1 CC To Mr.R.Loganathan, Advocate, SR NO.51386.

HCP.NO.210/2007

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